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In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 665.

ALBERT L. WIELAND,
Also known as A. L. WIELAND, as Receiver,
Petitioner,

v.

HARRY H. PAGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio,
and
BRIEF IN SUPPORT OF PETITION.

CHARLES ANDRADE,
Leader Bldg., Cleveland, Ohio,
JOHN H. McNEAL,
HARLAN J. McNEAL,
1967 East 9th St., Cleveland, Ohio,
T. E. McNEVIN,
Union Commerce Bldg., Cleveland, Ohio,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Albert Wieland, also known as A. L. Wieland, individually and as Receiver, respectfully petitions this Court for a Writ of Certiorari to review a judgment of the Supreme Court of Ohio, styled Harry E. Page v. Albert E. Wieland, 137 O. S. 198; 28 N. E. (2d) 583, rendered on July 10, 1940, reversing a decision of the Eighth District Court of Appeals for Ohio and affirming a judgment of the Court of Common Pleas of Cuyahoga County, Ohio.

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

For purposes of convenience the parties will be referred to as they appeared in the Common Pleas Court and as they were referred to by the Supreme Court of Ohio, viz: Harry E. Page, plaintiff, and Albert L. Wieland, defendant.

The plaintiff brought an action in the Court of Common Pleas of Cuyahoga County, Ohio, against the defendant, Albert L. Wieland, as Receiver, to recover damages for injuries sustained by him on the rear stairway of an apart-

ment house resulting from the alleged negligence of the defendant in failing adequately to light said stairway contrary to ordinances of the City of Cleveland, alleged to have been therefor made and provided.

Plaintiff claimed that on March 3rd, 1935, while lawfully ascending the rear stairway "after dark" he stepped on a milk bottle and was thereby thrown down the stairway, sustaining injuries; that there was "no lighting on the rear of the building at all" and that there was then "just light enough to distinguish the stairs." The action was predicated upon certain lighting ordinances of the City of Cleveland, among them Section 1222 (c), (Record, pages 1-7), set out in the amended petition. Issue was joined by an answer in the form of a general denial.

The ordinances were neither introduced nor admitted into evidence in the trial court, were not a part of the Bill of Exceptions in either the Appellate or the Supreme Court of Ohio, and are not included as evidence in the present record. (Record, pages 13, 14; 21-22; 22-35; 42.)

The plaintiff, in order to introduce the ordinances, sought to lay the necessary foundation therefor through the records of the City Clerk; Mr. McNeal, defense counsel, waived this single step in the procedure, stated that he had been advised by plaintiff's counsel that the ordinances were in force, admitted that the ordinances were accurately pleaded, waived nothing else and objected specifically to the competency, relevancy and the materiality of such ordinances. (Record, pages 22, 23.) The court then formally stated for the record the following:

> "The Court: The record may show at this time you are waiving the right to have the Clerk of the Council come down.
>
> Mr. McNeal: That is true.
>
> The Court: Now all other questions are reserved until after the evidence is heard.

The Court: Of course you are reserving your objections to the ordinances.

Mr. McNeal: Oh, yes." (Record, page 23.)

No further steps were taken by the plaintiff to introduce the ordinances. The trial court thereafter never ruled upon the admissibility of the ordinances or upon the objection to their relevancy, materiality or competency. (Record, pages 22-35.)

Upon this state of the record without indicating whether he sustained or overruled defendant's objection, and without affording the defendant an opportunity during the taking of testimony factually to rebut the applicability, relevancy or materiality of the ordinances, had he ruled adversely upon defendant's objections, the trial judge charged the jury that by reason of an ordinance of the City of Cleveland then in force and effect, it was the duty of the defendant to provide the rear stairway of said building with sufficient light; that if the jury found that the stairway was not sufficiently lighted then "as a matter of law the failure to provide the stairway with sufficient light constituted negligence"; that if the defendant failed to provide sufficient light on the stairway, "then you must find in that respect that the defendant was negligent." (Record, pages 22-35.)

Upon verdict for plaintiff, judgment was entered by the trial court. An appeal was had to the Court of Appeals, which reversed the judgment

> "for error of law in that the trial court failed to rule on the admissibility of the ordinances, although so requested, and the court failed to rule on the objections, and the ordinances were not admitted into evidence and do not appear in the Bill of Exceptions. The court was in error in instructing the jury upon said ordinances because they were not in the record." (Record, page 42.)

On July 10, 1940, the Supreme Court of Ohio reversed the Court of appeals, affirming the judgment of the Common

Pleas Court on the ground that defense counsel's waiver of the "production and preliminary proof of the Municipal ordinance," viz: the waiver of the need for laying the foundation for the introduction of the ordinances, obviated the necessity of putting the ordinances into evidence. The court thus confused, to the defendant's prejudice, the physical production of the ordinances by the plaintiff for their introduction into evidence so as to apprise the jury of the language thereof, holding further that the trial court's failure to rule on the admissibility, relevancy and materiality of the ordinance was not prejudicial to the defendant's rights because of the exception taken by him to the court's charge.

The defendant filed an application for a rehearing in which he resisted the judgment of the Supreme Court on the ground that both the judgment and holding denied him due process of law under the 14th Amendment to the United States Constitution. The Court of Appeals having heretofore ruled favorably to the defendant reversing the judgment of the Court of Common Pleas, the defendant was not obliged to raise this question any earlier in the Supreme Court. In said application defendant contended that the approval of the trial court's failure to rule on defendant's objections deprived him of the right to offer evidence to refute the materiality and applicability of the ordinances, thereby depriving him of an adequate hearing, and that the court's affirmance of a judgment against him based upon ordinances which were not in the record deprived him of substantial rights without due process.

B.

STATEMENT AS TO JURISDICTION.

Jurisdiction is invoked under Title 28, U. S. C. A. Section 344(b); Judicial Code, Section 237(b) as amended by the act of February 13th, 1925.

The judgment of the Supreme Court of Ohio was rendered July 10, 1940. Application for rehearing, timely filed, was denied on the 2nd day of October, 1940. (Record, page 53.)

The following cases are believed to sustain jurisdiction:

Ohio Bell Telephone Co. v. Pub. Util. Com., 301 U. S. 292, 302, 303, 304;
Saunders v. Shaw, 244 U. S. 317;
Missouri v. Gehner, 281 U. S. 313, 320;
Brinkerhoff Faris Trust Co. v. Hill, 281 U. S. 673, 678;
Lovell v. Griffin, 303 U. S. 444;
Chicago, M. and St. Paul Ry v. Coogan, 271 U. S. 472;
Garland v. Washington, 232 U. S. 642, 645;
Rogers v. Peck, 199 U. S. 425, 435.

The jurisdiction of this Court to protect constitutional guaranties is "a jurisdiction conferred by law and designed to protect and maintain the supremacy of the constitution and the laws in pursuance thereof."

Ward v. Love, 253 U. S. 17, 23.

Therefore, this Court has said in *Davis v. Wexler*, 263 U. S. 22, 24

> "that if the Constitution and laws of the United States would be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

To the same effect, *Truax v. Corrigan*, 257 U. S. 312.

C.

THE QUESTION PRESENTED.

Was the defendant denied due process and equal protection under the 14th Amendment to the United States Constitution when because of the court's failure to rule on his objections he was denied the opportunity of offering testimony to rebut the applicability of ordinances which, although neither introduced nor admitted into evidence, were made the basis by the court for charging him with negligence, by reason of which judgment was rendered against him?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The grounds relied on by the plaintiff for the allowance of the Writ are:

1. The decision of the Supreme Court of Ohio is in conflict with the principles relating to due process as laid down in *Saunders v. Shaw,* 244 U. S. 317, 319; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292; *Morgan v. U. S.,* 298 U. S. 468.
2. The precise question whether the guarantee of due process under the 14th Amendment to the United States Constitution precludes a state court from failing to rule upon the admissibility or inadmissibility of evidence, whereby a litigant is deprived of the opportunity of offering rebuttal testimony, has not heretofore been decided by this Court.
3. It is urged that the concept of due process will not permit a court to render a judgment upon assumptions rather than upon facts properly in the record, nor condone its failure to rule on proper and timely objections, and thereby bar the aggrieved litigant from introducing rebuttal testimony.

PRAYER.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of this Court to the Supreme Court of Ohio, commanding that Court to certify and send to this Court for review and determination a transcript of the record and all proceedings in the case numbered and styled No. 27,921, Harry E. Page, Plaintiff-appellant, v. Albert L. Wieland, Defendant-Appellee, and that the judgment of said Court be reviewed by this Honorable Court.

Respectfully submitted,

CHARLES AUERBACH,
JOHN H. MCNEAL,
HARLEY J. MCNEAL,
T. E. MCNAMARA,
Counsel for Petitioners.

BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.
THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Ohio is reported in *Page v. Wieland,* 137 O. S. 198; 28 N. E. 583.

B.
JURISDICTION.

Jurisdiction is invoked under Title 28 U. S. C. A. Section 344(b), Judicial Code 237(b), as amended by the act of February 13, 1925.

C.
STATEMENT OF THE CASE.

A summary statement of the case is set out under heading "A" in the petition for Writ of Certiorari and for the sake of brevity is incorporated in this brief by reference.

D.
SPECIFICATION OF ERRORS.

1. The Supreme Court of Ohio erred in failing to hold that the Defendant was denied due process under the 14th Amendment when by the court's failure to rule on objections he was deprived of the right to refute the applicability of the ordinances upon which the plaintiff's cause of action was founded.

2. The Supreme Court of Ohio erred in failing to hold that he was denied due process under the 14th Amendment when it approved a judgment against the defendant upon the verdict of a jury which did not have before it the basic facts without which it could not find against him.

3. The Supreme Court erred in dismissing the defendant's application for rehearing, as involving no debatable Federal constitutional question.

SUMMARY OF ARGUMENT.

I.

An Important Question of Federal and Local Law is involved which should be settled by this Court.

II.

The Court's failure to rule upon the defendant's objections to the ordinances deprived him of an opportunity to refute their applicability and denied him due process.

III.

The judgment of the Court below was rendered against him without evidence in the record to support it and denied him due process.

ARGUMENT.

I.

An Important Question of Federal and Local Law is involved which should be settled by this Court.

The plaintiff obtained a judgment against the defendant in the Common Pleas Court of Cuyahoga County. On appeal the Court of Appeals ruled that the judgment was not valid in that it was not founded upon basic facts essential to recovery, to-wit: the ordinances upon which the cause of action was predicated, and for the further reason that the court failed to rule on the defendant's objections to the materiality, relevancy and competency of such ordinances. The Supreme Court of Ohio, upon appeal, reversed the judgment of the Court of Appeals, holding that although the plaintiff had not formally introduced the

ordinances, counsel's admission was tantamount to a concession of their existence, and the trial court's failure to rule on the defendant's objections was cured by his exception to the court's charge. This being the first ruling by an Appellate Court adverse to the defendant, he thereupon timely filed an application for a rehearing, wherein he contended that the judgment and holding of the Supreme Court sustaining the trial court's failure to rule on his objections, deprived him of the right to refute the applicability of the ordinances to the building in question, denied him an adequate judicial hearing because evidence necessary for the jury's determination of the issues was not known by them, and that the judgment was therefore entered against him without basis in fact, by reason whereof he was denied due process and equal protection guaranteed him by the 14th Amendment to the United States Constitution. The defendant contends that there is a substantial Federal question in the case to enable this Court to grant Certiorari, in that he was denied a hearing as contemplated by due process:

(1) Because the record conclusively shows and the Supreme Court's opinion admits that the basic ordinances were not introduced into evidence, nevertheless the judgment against him was sustained.

(2) Because the court's failure to rule upon the defendant's objections to the ordinances deprived him of the opportunity to refute their applicability to the building in question.

(3) Because a judgment was rendered against him based upon a verdict returned by a jury which did not have before it and therefore did not know the essential facts necessary for its determination of the issues in the case.

(4) Because the Federal question was raised by the defendant and ruled against him at the first opportunity after a Court of Review ruled adversely to him.

A refusal by a state court to *consider* a Federal question which is controlling in a case, is equivalent to a decision against the Federal right involved therein and gives the Supreme Court jurisdiction to review.

Des Moines Navigation & Railroad Co. v. Iowa Homestead Co., 123 U. S. 552;
Smithsonian Institute v. St. Johns, 214 U. S. 19;
Rogers v. Alabama, 192 U. S. 226, 230.

In more recent cases this Court held that whether the question of the violation of defendant's constitutional rights was adequately presented and was decided in the state court, is itself a Federal question. *Lovell v. Griffin*, 303 U. S. 444; *Schuylkill Trust Co. v. Pa.*, 296 U. S. 113, 121.

That this question was not raised in the trial court is immaterial because the defendant could not and was not obliged to anticipate that the court would fail to rule on his objections and then charge on the ordinances objected to. Under such circumstances though the Federal question was first presented to the State Supreme Court upon an application for a rehearing and was denied without the state court indicating the reason for its ruling upon such question, this Court can assume jurisdiction if the question was presented at the first opportunity.

Whitfield v. Ohio, 297 U. S. 431, 435, 436;
Brinkerhoff, Faris Trust Co. v. Hill, 281 U. S. 673, 677, 678;
Missouri v. Gehner, 281 U. S. 313, 320;
City National Bank v. Durr, 257 U. S. 99;
State, ex rel. Anderson v. Brand, 303 U. S. 95, 98;
Home Ins. Co. v. Dick, 281 U. S. 397.

The denial by the court of the right to refute and explain is a denial of due process of law:

Ohio Bell Telephone Co. v. Public Util. Com., 301 U. S. 292, 300, 302, 303, 304;

Interstate Commerce Commission v. L. & N. R. R. Co., 277 U. S. 88, 91, 93.

"A hearing is not judicial, at least in an adequate sense, unless the evidence can be known."

Ohio Bell Tel. Co. v. Pub. Util. Com., supra;
U. S. v. Abilene & So. Ry. Co., 265 U. S. 274, 288;
The Chicago Junction Case, 264 U. S. 258, 265.

This Court will not permit the foreclosure of a claimants constitutional right because of the state court's findings of fact, which would preclude jurisdiction. It will examine the facts to see whether the evidence adequately sustained the findings.

Davis v. Wexler, 263 U. S. 22, 24;
Truax v. Corrigan, 257 U. S. 312;
Ward v. Love, 253 U. S. 17, 23.

The Intermediary Appellate Court found that the plaintiff did not introduce the ordinances and reversed the judgment of the Court of Common Pleas. The Supreme Court of Ohio did not find to the contrary but held that the act of defendant's counsel in waiving the production and preliminary proof was tantamount to an admission. Such conclusion will not defeat the jurisdiction of this Court if plaintiff has thereby been deprived of due process. The case then falls within the rule that where the state court makes a general or ultimate conclusion of fact, the Supreme Court will review the facts to ascertain whether the litigants' constitutional rights were violated. It is within the rule also that where a conclusion of law and finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question to analyze the facts, this Court will do so.

Norfolk Ry. Co. v. Connelly, 236 U. S. 587, 590;
Fiske v. Kansas, 274 U. S. 380, 385, 396;
Beidler v. South Carolina, 273 U. S. 548;
Aetna Life Insurance Co. v. Dunken, 266 U. S. 389.

The instant case turns not upon a question of fact, but involves a very important principle of law, whether a court may by the simple act of failing to rule upon an objection treat the objected matter in its charge as though it had been properly introduced and deprive the litigant adversely affected, of the opportunity to produce testimony to refute it. Whether such action of a state court contravenes due process is the question before this Court.

Even if there existed a non-federal ground, it was not adequate to support the decision of the court below. In all events the adequacy of the non-federal ground is for this Court to determine in order to safeguard the litigants' constitutional rights as has been stated many times.

Abie State Bank v. Bryan, 282 U. S. 765, 773;
Brood Ry. Co. v. South Carolina, 281 U. S. 537, 540;
Indiana, ex rel. Anderson v. Brand, 303 U. S. 95, 98.

In *Indiana, ex rel. Anderson v. Brand, supra*, the Court said:

> "We cannot refuse jurisdiction because the state court might have based its decision consistently with the record upon an independent and adequate non-federal ground. And since the Amendment to the Judiciary Act of 1789 by the act of Feb. 5, 1867, it has always been held that this court may examine the opinion of the state court to ascertain whether a Federal question was raised and decided and whether the court rested its judgment on an adequate non-federal ground."

The conclusions of the court below are not so binding upon this Court as to exclude its jurisdiction where the Court can take jurisdiction upon broad constitutional grounds.

Acme Harvester Co. v. Buckman, 222 U. S. 305, 330;
Norris v. Alabama, 294 U. S. 587, 589, 590;
Abie State Bank v. Bryan, 282 U. S. 765, 773.

II.

The court's failure to rule upon the defendant's objections to the ordinances deprived him of an opportunity to refute their applicability and denied him due process.

In *Morgan v. U. S.*, 304 U. S. 1, 19 this Court held that the constitutional mandate of due process requires that a "full" hearing shall include the right to present evidence as well as a reasonable opportunity to know the claim of the opposing party and to meet it. This Court has ruled similarly in *Morgan v. U. S.*, 298 U. S. 468, and in *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292.

The Lord Chief Justice Hewart in his work "The New Despotism" at pages 31-32 defines the work of a court as follows:

> "The work of a court involves many important ingredients, as for example:
>
> 1. That the judge is identified and is personally responsible for his decisions.
> 2. That the case, subject to rare exceptions, is conducted in public.
> 3. That the result is governed by impartial application of principles which are known and established.
> 4. That all parties to the controversy are fully and fairly heard.
>
> * * * The administration of the law of the land in the ordinary courts presupposes at least personal responsibility, publicity, uniformity and the hearing of the parties."

The Supreme Court of Ohio, we respectfully submit, by reversing and disapproving the judgment of the Court of Appeals and affirming and approving the judgment and conduct of the Court of Common Pleas has violated Canons Nos. 3 and 4, as well as the American concept of due process. Failure to rule on defendant's objections to matters which if promptly, even though adversely, ruled upon,

would call for rebuttal testimony, and then to charge the jury that they must consider such matters as proven, depriving the defendant of the right to introduce such testimony, denies the litigant that hearing of the parties said by the Lord Chief Justice to be an essential ingredient of the work of the court, and deprives him of a full and fair judicial hearing under the concept of due process of this Court.

While the impartiality of the court below in applying its concept of the legal principles is not questioned or in any manner impugned, we, nevertheless, most earnestly contend that such principles as were enunciated by the court below are not known or well-established. In fact, we submit that they are contrary to the principles enunciated by this Court in *Saunders v. Shaw,* 244 U. S. 317, 319; *Ohio Bell Telephone Co. v. Pub. Util. Com.,* 301 U. S. 292, as regards due process. By the lower court's ruling and judgment the Defendant was deprived of an opportunity to present evidence essential to the determination of the issues in the case. A denial of the right to refute and explain is a denial of due process of law. *I. C. C. v. L. & N. R. R. Co.,* 227 U. S. 88, 91, 93.

> "An objecting opponent is ordinarily entitled to an immediate ruling, before the close of the proponent's case, declaring the evidence admissible or inadmissible, either absolutely or conditionally, insofar as otherwise he would be unable to know what evidence on his part in explanation or rebuttal would be needed."
>
> *Wigmore on Evidence,* 3rd Ed. 348, Section 19.

"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known," this Court has said in *Ohio Bell. Tel. Co. v. P. U. C.,* 301 U. S., *supra*; and also in *West Ohio Gas Co. v. Public Utilities Commission,* 265 U. S. 274, 288, and *The Chicago Junction* case, 264 U. S. 258, 263, 264, 265.

The Supreme Court of Ohio swept aside the lower court's failure to rule upon defendant's objections to the relevancy and materiality of the ordinances by the assertion that his rights were saved by the general exception to the charge. No precedent in Ohio or elsewhere is cited to support the court's view that under such circumstances the defendant was not denied due process. The fallacy of this statement is apparent upon inspection thereof. The exception to the court's charge was made at the close of the entire case and prior to the trial court's submission of it to the jury for its consideration. The jury had already been instructed if it found that there was insufficient light it had to find the defendant guilty of negligence because it was in violation of the city ordinances. (R. 29, 30.) An objection by defendant to the charge at this stage of the proceedings, although specially made, was futile. He could do nothing to cure the error because the case was at an end, except for the deliberation by the jury. Had the court ruled upon the objections at the close of the plaintiff's case, the defendant could then have offered testimony to refute the applicability of the ordinances. The court not having ruled upon the objections, thus lulled the defendant into a false sense of security that the ordinances were not in the record. The defendant therefore was not obliged at this stage of the proceedings when he was offering testimony, to introduce evidence to refute that which was not in the record.

To give the answer whether the defendant committed any chargeable acts of omission or commission, the trier of the facts had to weigh the evidence, draw inferences from positive facts, judge credibilities, and, above all, know the terminology of the ordinances, the basic fact upon which plaintiff's whole case rested. The record indicates that all other allegations of negligence were withdrawn from the jury and that there was left for its consideration only one allegation of negligence, to-wit: whether the defendant violated the ordinances of the City of Cleveland referring to

lighting in an apartment house. (Record, page 24.) The jury did not have the benefit of the pleadings which set forth the ordinances. (Record, page 35.) Without the wording of the ordinances before it, the jury could not say what were the defendant's duties and obligations thereunder. Nevertheless, the Supreme Court of Ohio held that since the trial court read a portion of the ordinance which it deemed applicable to the jury, the defendant's rights were sufficiently safeguarded by defendant's exceptions. We believe that precedent and the orderly processes of judicial trial require a contrary ruling. We submit the defendant did not have his day in court and that he was denied that full and fair hearing guaranteed him by the 14th Amendment.

III.

The judgment of the court below was rendered against him without evidence in the record to support it, and denied him due process.

In *Ohio Bell Telephone Co. v. Pub. Util. Com.*, 301 U. S. 292, the Public Utilities Commission undertook to fix a valuation of the Ohio Bell Telephone Company's property for the years 1926 to 1933 in its relation to rates. For this purpose the Commission took judicial notice of price trends in land, labor and engineering construction during those years and referred to findings of an Illinois Federal Court concerning values of an affiliated company. Upon the basis of these findings and such judicial notice, it ordered a refund of charges collected under bonds. The company protested that the Commission could not judicially notice the trend of percentages which did not come from official sources; that they had not been introduced in evidence; that the company was not afforded an opportunity to explain or rebut them, and that it was therefore "denied a fair hearing in contravention of the requirements of the 14th Amendment." This Court, in reversing the decree,

upheld the contention of the company and stated (at page 300):

> "First, the fundamentals of the trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record."

The Court further, at page 302, used this language:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular evidential facts of which the Commission took judicial notice, and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms." (page 302.)
>
> "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *Ibid* 304.

In *Morgan v. U. S.*, 298 U. S. 468, this Court held, page 480:

> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The hearing is designed to afford the safeguard that the one who decides it be bound in good conscience to consider the evidence, to be guided by that alone, and to reach its conclusion uninfluenced by

extraneous considerations, which in other fields might have played in determining purely executive action.

> "The hearing is a hearing of evidence and argument. If the one who determines the facts which underly the order has not considered evidence or argument, it is manifest that the hearing has not been given."

The Supreme Court of Ohio has likewise pronounced this principle, which has guided litigants in trials of cases in our state for many years, holding,

> "The entry of a judgment does not and cannot accomplish substantial justice when the record makes clearly manifest the fact that substantial rights guaranteed by the law and constitution have been denied the party against whom the judgment operates."
>
> *Taylor v. Schlichter,* 118 O. S. 131, 144.

The requirement of a fair trial by an impartial tribunal, which shall render judgment upon the evidence legally before it, based upon legal principles given it for its guidance, is not met, we respectfully submit, where, as here, without an opportunity to read the ordinances, without which the entire cause of action fails, and without testimony before it whether any such ordinance is by its terms applicable to buildings constructed before its passage, without affording the defendant the opportunity to produce testimony that such ordinance under Ohio Law is not applicable to defendant's building, or at least "to challenge deductions made from" the trial court's cursory and superficial reading of a portion thereof to them, a jury is permitted to render a verdict against a defendant, upon which verdict judgment is thereafter rendered against him. It is as though one suing upon a promissory note were granted a judgment without having introduced the note into evidence, even though the maker may have admitted that such note was in existence.

We do not contend that in order to obtain a fair trial commensurate with the principles of due process, a court cannot include in its charge or omit therefrom matters not

substantially affecting the rights of the parties. Where, however, issues are defined to a jury as having been made on facts which are not existent in the record, as where the jury is advised that if they find that the defendant failed to provide "sufficient light," he violated an ordinance and was therefore negligent, when no such ordinance was in the record; and where a trial judge fails to rule upon an objection to the applicability of such an ordinance depriving the objector of the right to refute or explain his non-compliance, he is unfairly disadvantaged and is denied a full and fair hearing as contemplated by the 14th Amendment to the United States Constitution. Upon the application for a rehearing the Ohio State Supreme Court had this question before it, fully briefed and thoroughly presented. That Court, however, denied the defendant's application in contravention, we maintain, of due process guaranteed by the 14th Amendment.

It is clear that the judgment rendered against the defendant, which was reversed by the Appellate Court but affirmed by the Supreme Court of Ohio, could not have been based on "facts and circumstances, which ought to be considered" and, "were excluded from consideration." Such judgment did not embrace "basis facts" necessary to its validity, as enunciated by this Court in *Morgan v. U. S.*, 298 U. S. 468, 480, because:

1. The ordinances, as the Court of Appeals found, were not in evidence.
2. The record could not under the circumstances of this case contain evidence to refute the applicability of such ordinances to the building in question, because of the court's failure to rule on the defendant's objections thereto.

The result of the case at bar cannot be said to be governed by the "impartial application of principles which are known and established," as are set forth to be the minimum requirements of a judicial proceeding.

The fundamental fallacy in the judgment of the court below, we respectfully contend, is in its sacrifice of substance upon the altar of simplicity in procedure. It denied the defendant due process. From its syllabus it is manifest that the ordinances so essential to the determination of the issues were not introduced by the plaintiff. It says, however, that the defendant's admissions were tantamount to a concession. The Court of Appeals could not find such concession. The trial court's statement (Record, page 23), indicates no such concession, but manifests clearly that for the purpose of the record, defendant counsel waived only the preliminary steps essential to the production of the ordinances, not the introduction thereof. At page 49, the court below says the defendant cannot complain because he waived the **production** of the ordinance. Certainly, this is recognition of the fact that while the defendant may have waived the production of the ordinances, he did not waive the introduction of any of them.

SUMMARY AND CONCLUSION.

We have undertaken to show that the Supreme Court of Ohio in denying the defendant the opportunity and the right to offer testimony to refute the applicability of the ordinance to the building in question, failed to grant the defendant such hearing as is contemplated by the due process clause of the 14th Amendment to the United States Constitution. We further have undertaken to show that the rendition of a judgment against him sans the vital element upon which the cause of action was founded, to wit: the ordinance, denied him due process as is contemplated by the 14th Amendment.

We likewise contend that these questions were raised in the Supreme Court of Ohio at the first opportunity offered the defendant; that because the Court of Appeals ruled favorably to the defendant's contentions, he was not obliged to raise these questions in the Supreme Court until

after an adverse ruling was made against him. This he did in the application for a rehearing, which the Supreme Court denied.

Your petitioners submit, therefore, that the relief prayed should be granted, and that the decision of the Supreme Court be reviewed by this Court and that upon final hearing said decision be reversed and remanded.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 665.

ALBERT L. WIELAND,
Also known as A. L. WIELAND, as Receiver,
Petitioner,

vs.

HARRY E. PAGE,
Respondent.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

It is contended by plaintiff's counsel that the Supreme Court of Ohio did not consider or pass upon the federal question. The application for rehearing filed in the Supreme Court of Ohio admittedly raised the very questions relied upon in the petition for writ of certiorari here. (Respondent's Brief, pages 6, 7, and 8.) The federal question was therefore presented to the Supreme Court of Ohio by the application for rehearing. Its denial thereof necessarily denied the plaintiff's claim that his federal constitutional rights were denied.

The plaintiff further contends (Brief, page 3) that he introduced the ordinances set forth in his pleadings. This is not the record. The opinion of the Supreme Court of Ohio clearly indicates that the ordinances were not introduced. It was the opinion of the court that the ordinances were in evidence not because of their introduction by the plaintiff, but because it concluded that defense counsel's waiver of the requirement for calling the city clerk to produce the ordinances was tantamount to their admission. That this was an erroneous conclusion is apparent from the trial court's statement for the record:

"The Court: The record may show at this time you are waiving the right to have the Clerk of the Council come down.

Mr. McNeal: That is true.

The Court: Now, all other questions are reserved until after the evidence is heard." (R. 22-23.)

Again at page 5 of his brief, Respondent's counsel states that the court gave the jury the substance of the ordinances and their legal effect, but this is not sufficient. It is settled law in Ohio, as the court below itself has said, that an ordinance unless admitted by the pleadings or in open court by the parties must be presented like a foreign state statute. (Opinion of Supreme Court of Ohio, R. 48.) So that giving the jury the substance of the ordinances and their legal effect did not give them an opportunity to learn the exact terminology of the ordinances, the "basic facts" necessary for its consideration before the defendant could be legally charged with negligence.

The plaintiff cites *Robertson and Kirkham on Jurisdiction of the Supreme Court of the United States*, page 121, Note 41. It is noteworthy that the same author states in the same note the following:

> "Where the record filed in the Supreme Court is unprinted, counsel who intend to rely upon the doctrine of the 'surprise' cases, should so advise the clerk of the Supreme Court. Otherwise in printing the record he may omit the petition for rehearing if it was denied without more pursuant to the general order of the court requiring him to omit immaterial matter."

The record in the instant case was printed and certified by the court below and we contend sufficient compliance was had with the rule. Especially is this so in view of counsel's admission in his Brief at pages 6, 7 and 8 that the federal question was raised on defendant's application for rehearing in the Supreme Court of Ohio, and that said application included the present claim.

The plaintiff contends that *City National Bank v. Durr*, 257 U. S. 99, does not support defendant's position that raising the federal question upon application for a rehearing in the State Supreme Court is timely to support certiorari. We, therefore, quote from page 106 of that case as follows:

> "After the final decision in an application to The Supreme Court for a rehearing, plaintiff for the first time asserted that the decision if adhered to rendered the Ohio Taxation statutes invalid because of such repugnance. This application was denied without reasons given and hence must be regarded as having come too late to raise any question for review by this court. (Citations.) Therefore, a writ of error allowed by the Chief Justice of the Supreme Court must be dismissed because not the proper mode of review under Paragraph 237, Judicial Code, as amended by Act of Sept. 6th, 1916, C. 448, 39 Stat. 726. But an application for the allowance of a writ of certiorari, made to this court under the same section, consideration of which was postponed until the hearing on the writ of error, will be granted and the case determined thereunder."

We reiterate that up to the time when the Supreme Court of Ohio ruled against the defendant and rendered its opinion, the defendant was successful except for the judgment entered against him in the *nisi prius* court. Not only is it the contention that the trial court erred in considering ordinances without formally admitting them into evidence, but serious error occurred which deprived the defendant of due process when the court failed to rule on his objections to such ordinances and thereafter commented upon them and charged the jury thereon. Even after defendant's counsel called the attention of the court to the error committed by saving an exception to that part of the court's charge in which reference was made to the municipal ordinance (R. 35) the court did nothing to correct the error.

Questions were raised in the Supreme Court of Ohio at the first opportunity offered the defendant. Since the Court of Appeals ruled favorably upon the defendant's contention he was not obliged to raise the question in the Supreme Court until after an adverse ruling was made against him.

Respectfully submitted,

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Respondent.

BRIEF OF RESPONDENT
Opposing Petition for Writ of Certiorari.

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HARRY E. PAGE,
Respondent.

BRIEF OF RESPONDENT
Opposing Petition for Writ of Certiorari.

OPINION BELOW.

The opinion of the Supreme Court of Ohio is reported in *Page vs. Wieland, Recr.*, 137 Ohio St. 198, 28 N. E. (2d) 583.

JURISDICTION.

Petitioner seeks to invoke jurisdiction under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925. However, as will be pointed out below, such claim of jurisdiction is not well founded.

STATEMENT OF THE CASE.

The parties will be referred to as they appeared in the trial court. The respondent was plaintiff and the petitioner was defendant. All emphasis in quoted matter appearing in this brief is ours, unless otherwise designated.

The History.

This is an action to recover for severe personal injuries. The action originated in the Court of Common Pleas of Cuyahoga County, Ohio. Trial was had to a jury upon the plaintiff's second amended petition and the defendant's answer. After a trial which took more than a week, the jury brought in a verdict for the plaintiff in the sum of ten thousand dollars and the court rendered judgment for said amount in favor of the plaintiff and against the defendant.

The defendant then appealed on questions of law to the Court of Appeals for Cuyahoga County. By a divided court, with two judges in the majority and one dissenting, the Court of Appeals reversed the Court of Common Pleas and remanded the case for retrial.

The plaintiff then filed a motion in the Supreme Court of Ohio for an order to require the Court of Appeals to certify its record to the Supreme Court of Ohio. The motion was granted and the Supreme Court of Ohio heard the case on its merits. The Supreme Court of Ohio reversed the Court of Appeals and affirmed the judgment of the Court of Common Pleas. The defendant then filed an application for rehearing in the Supreme Court of Ohio, which application was denied without opinion.

The Facts.

Plaintiff, on the evening of March 3, 1935, was invited as a guest for dinner by the occupants of a second-floor suite of premises known as the Huling Hotel. The stairway leading to his hosts' suite was not provided with lights, contrary to the ordinances of the City of Cleveland. As plaintiff was ascending this stairway thus inadequately illuminated, he stepped on an object which later appeared to have been a transparent milk bottle, lost his balance and fell backwards down the stairs, breaking his neck. Whereas prior to these injuries he had been a healthy, active, able-

bodied man, steadily employed in his work as machinist; by reason of the injuries he became permanently, painfully and totally disabled, with the normal function of his spine destroyed, his arms and hands partly paralyzed, and with the prognosis that his condition would steadily grow worse.

At the time, the Huling Hotel was in charge of defendant as receiver. It consisted of a large three-story brick building containing some eighty rooms and was being operated as a lodging house and hotel. The defendant as receiver had failed to comply with the ordinances of the City of Cleveland requiring all public halls, stairways and passageways in buildings of this character to be adequately lighted at all hours and, more specifically, requiring all stairways to be provided with sufficient artificial lights to light the same from sunset to sunrise. The pertinent ordinances are set forth at length on pages 2 to 6 of the second amended petition (R. 2-6).

The Proceedings.

At the trial of the case, the first thing the plaintiff did was to introduce the ordinances as set forth in the pleading, and offer to bring down the City Clerk, whom he had under subpoena, to testify to them. The defendant, in open court, waived the necessity of bringing down the City Clerk as a matter of proof, and admitted that the ordinances as set forth in the pleading were in force. He stated that he was objecting only to the competency, relevancy and materiality of the ordinances. The court then stated that the ordinances might be offered at that time, and that he would rule on the objections after all the evidence was in. So that there may be no mistake about what occurred, plaintiff quotes the record.

"The Court: Call your first witness.

Mr. Kutash: I first wish to *introduce the various sections of the municipal ordinances that are pleaded in the petition.* I have the City Clerk under subpoena

to bring down those original ordinances unless, as I understand Mr. McNeal—

The Court: *Is there any dispute, Mr. McNeal,* first, *as to the accuracy with which the pleading sets forth those ordinances?*

Mr. McNeal: No.

The Court: Then I suppose there still is a question as to the relevancy.

Mr. McNeal: That is true.

The Court: Well, then, for the purpose of our proceeding this afternoon, to facilitate things, *may we consider that these may be offered at this time,* and that counsel will reserve the right to object on the ground of relevancy only, and *we can rule on the question of relevancy after all the evidence is in?*

Mr. McNeal: Well, I would rather reserve the right to object on the ground of incompetency, irrelevancy and immateriality.

The Court: The only thing I am getting at is this: I was wondering whether it would be necessary for any reason to call the City Clerk.

Mr. McNeal: No; no. *I have already told Mr. Kutash he doesn't need to do that, as a matter of proof. I am just objecting to the competency, relevancy and immateriality.* They have told me that they have inspected the records and they found that *they were in force.*

The Court: The record may show at this time you are waiving the right to have the Clerk of the Council come down.

Mr. McNeal: That is true.

The Court: Now, all other questions are reserved until after the evidence is heard.

* * * * *

The Court: Of course, you are reserving your objections to the ordinances?

Mr. McNeal: Oh, yes." (R. 22-23.)

As the trial proceeded it became apparent from the testimony of both sides that the ordinances *were* relevant, competent and material, and applied to this situation. After that, the defendant never questioned the relevancy of the

ordinances. He never offered any testimony, nor indicated that he had any testimony, tending to show the non-applicability of the ordinances. Indeed, he subsequently contended in the Court of Appeals that the ordinances were so relevant they made out a case of negligence *per se* against him. And even in the Supreme Court of Ohio he never questioned the applicability of the ordinance involved (R. 49).

After the plaintiff rested his case, relying on these ordinances, the defendant moved for a directed verdict. The court overruled the motion and directed defendant to proceed with his testimony (R. 23-24). Defendant proceeded to present his case fully. At the conclusion of the entire case defendant made numerous further motions. He moved for a directed verdict after close of all the evidence (R. 24). He moved to strike the first specification of negligence relating to lighting (R. 24). He objected to certain requests to charge before argument which referred to the ordinances (R. 25-27). Although he argued these motions on various grounds, he did *not* claim that he had been denied any opportunity to offer evidence or that he had been denied any constitutional rights. The court overruled defendant's motions and objections and proceeded to charge the jury, giving the jury the substance of the ordinances and their legal effect (R. 29-30). Both at the conclusion of the plaintiff's case and at the end of the entire case, it was obvious that the court considered the ordinances relevant, competent and material since the court overruled defendant's motions which involved the ordinances, and then charged the jury on the ordinances.

After the trial and verdict of the jury, defendant filed a motion for new trial claiming forty-one grounds (R. 11-16), and a motion for judgment notwithstanding the verdict, claiming twelve grounds (R. 16-17). In neither of these motions after trial did defendant claim that the court had failed to rule on his objections or that he had been prevented

thereby from offering any evidence or that he had been denied any rights under the Fourteenth Amendment to the Constitution of the United States.

After the trial court overruled his motions and entered judgment against him, defendant appealed on questions of law to the Court of Appeals. His assignment of errors specified twenty-two claimed errors (R. 36-40). No claim, however, was made that he had been prevented from offering any evidence as to the applicability of the ordinances or that he had been denied any rights under the Fourteenth Amendment.

The first and only time that the federal question was raised was on the application for rehearing in the Supreme Court of Ohio. This application, which included the present claim at the end of a list of some twenty-two alleged grounds, was denied without reasons given, and the alleged federal question never considered or passed on by the Supreme Court of Ohio.

The record filed and relied on by defendant in this Court omits the application for rehearing in the Supreme Court of Ohio. Hence, the record before this Court is utterly devoid of any mention of, or reference to, the Fourteenth Amendment to the Constitution of the United States or the alleged federal question.

SUMMARY OF ARGUMENT.

I. THE ALLEGED FEDERAL QUESTION WAS NOT PROPERLY RAISED IN THE STATE COURTS.

A. The record before this Court fails to show that any federal question was ever raised in the state courts.

B. Even disregarding the defective record, the alleged federal question was raised too late.

C. Defendant's claim that he could not have raised the question earlier is without merit.

D. The authorities cited by defendant do not support his position.

II. THE ALLEGED FEDERAL QUESTION IS WITHOUT SUBSTANCE.

A. The controlling question in this case has already been decided by this Court.

B. The claim that the defendant was misled by the court and prevented from offering testimony is utterly without merit.

ARGUMENT.

I.

THE ALLEGED FEDERAL QUESTION WAS NOT PROPERLY RAISED IN THE STATE COURTS.

A.

The record before this Court fails to show that any federal question was ever raised in the state courts.

The only instance in the entire proceedings in the state courts in which defendant set up or claimed the denial of a right under the federal constitution was his application for rehearing in the highest state court. As pointed out above, the record before this Court does not include such application for rehearing. It is our understanding that such defect is fatal under the rule and decision of this Court requiring that the record must affirmatively show on its face that the question was properly presented to the state courts.

McGarrity v. Delaware River Bridge Commission, 292 U. S. 19, 20:

> "No Federal question was raised prior to a petition for rehearing in the Supreme Court of the State, which was denied without more. Appellant insists questions under the Fourteenth Amendment were thus raised at the first opportunity. *The petition for rehearing does not appear in the record.* * * *
>
> "The appeal is dismissed for the want of a properly presented substantial Federal question."

Robertson and Kirkham on *Jurisdiction of the Supreme Court of the United States,* p. 121, footnote 41.

B.

Even disregarding the defective record, the alleged federal question was raised too late.

The first time the alleged federal question was raised was on application for rehearing to the highest state court, and that court neither entertained the application nor passed on the point. (The statement appearing at the top of page 10 of petitioner's brief that the Supreme Court of Ohio dismissed the application as involving no debatable federal constitutional question is entirely without basis (R. 53).)

It is the settled rule of this Court that federal questions first presented in a petition for rehearing to the highest state court are not timely raised, unless the state court actually entertains the petition and expressly passes upon the federal question.

Godchaux v. Estopinal, 251 U. S. 179, 181:

> "The settled rule is that, in order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."

Rooker v. Fidelity Trust Co., 261 U. S. 114, 117:

> "All that appears is that, after the judgment of affirmance, the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late."

Herndon v. Georgia, 295 U. S. 441, 443:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Robertson and Kirkham on *Jurisdiction of the Supreme Court of the United States*, p. 119, and the very numerous authorities cited therein.

C.

Defendant's claim that he could not have raised the question earlier is without merit.

Defendant seeks to excuse his failure to raise the alleged federal question in the trial court by the claim that he could not "anticipate that the court would fail to rule on his objections and then charge on the ordinances objected to." (Petitioner's brief, p. 12.) Such claim is patently faulty. If, as he now claims, he was not given a fair trial, then he not only had the right, but he was obliged, to raise the question in the trial court by his statutory motion for a new trial (Section 11576 of the Ohio General Code). Keeping in mind that the motion for a new trial is made *after* trial and verdict, defendant can hardly say that he could not "anticipate" events which obviously had already occurred. Even if we overlook defendant's failure to raise the question during trial, it is clear that he certainly had the opportunity to raise it in his motion for new trial made in the trial court.

This Court has repeatedly held that if the federal question was not raised in the trial court as required by state practice and was not expressly passed on by the appellate court, it will not support a claim of jurisdiction in this Court.

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 308:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in § 709 (U. S. Comp. Stat. 1901, p. 575), and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised. * * *

"The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. * * * It is not properly made when made for the first time in a petition for rehearing after judgment; * * *."

Morrison v. Watson, 154 U. S. 111, 115:

"In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the state; it cannot be asserted in this court."

Chicago Ind. & L. R. Co. v. McGuire, 196 U. S. 128, 193; *Jacobi v. Alabama,* 187 U. S. 133, 135, 136;

Robertson and Kirkham on *Jurisdiction of the Supreme Court of the United States,* p. 111.

Defendant does not dispute in his brief that under the law of Ohio such question must be raised in the trial court if the appellate courts are to consider it, and therefore no discussion on that point seems necessary. However, the very numerous authorities so holding will be found assembled at 2 *Ohio Jur.* p. 203, *et seq.*

It should also be noted that the defendant not only neglected to raise his alleged federal question in the trial court, but he neglected to raise it in the Court of Appeals where, as the appellant, it was his duty to raise such questions as he wished considered. Indeed even if he had raised the question in the trial court, his failure to preserve it in the appellate court would have constituted a waiver of the question. (Authorities collected in *Robertson and Kirkham* on *Jurisdiction of the Supreme Court of the United States* at p. 115.)

Defendant further seeks to excuse his untimely raising of the question by declaring that he raised the question the first time an *appellate* court ruled against him. Such claim is also rather disingenuous. The requirement of the rule is that the question be raised at the first opportunity —whether that opportunity be afforded in a trial court or in an appellate court. The exception which defendant is inferring neither exists nor has anything in justice or reason to recommend it. In the words of Mr. Justice Brown in *Chicago, Ind. & L. R. Co. v. McGuire, supra*: "This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted."

D.

The authorities cited by defendant do not support his position.

Defendant has cited six cases which deal with the timely raising of the question.

Three of them are of the so-called "surprise" type. While it is true that in these cases the raising of the question for the first time on application for rehearing in the highest court of the state was held timely, the reason for such holding was that the highest state court was the first court to create the situation which was the basis for the complaint. In the *Sanders v. Shaw* case, 244 U. S. 17, the highest state court was the first one to decide the particular question of fact involved and to render judgment for the plaintiff. In the *Missouri v. Gehner* case, 281 U. S. 313, the highest state court was the first court to include in its assessment the particular bonds involved. In the *Brinkerhoff-Faris Trust Company v. Hill* case, 281 U. S. 673, the surprise consisted of the ruling by the highest state court, for the first time, that plaintiff could have pursued a certain other remedy which the same court had previously held was not open to him and the time for pursuing which had expired. None of these cases has any pertinency here. The highest state court in the instant case did nothing more than affirm the judgment in the trial court. It injected no element of "surprise." The situation complained of here is the situation which occurred in the trial court. (Furthermore, as pointed out at pages 7-8 above, if the so-called "surprise" exception is to be relied on, the record must contain the application for rehearing which first raised the question.)

Of the other three cases, two of them: *Whitfield v. Ohio,* 297 U. S. 431, and *Home Ins. Co. v. Dick,* 281 U. S. 397, do not apply because they are expressly based on the fact that the highest state court treated the federal question as properly raised, although it had not been, and expressly

passed on the question—a well established exception to the rule. Such, however, is emphatically not the situation here. The highest state court never recognized the federal question or passed on it in any way.

The remaining case, *City National Bank v. Durr*, 257 U. S. 99, supports, not the defendant's position in this case, but the plaintiff's position. It expressly holds that a federal question first raised on application for rehearing in the highest state court comes too late. Defendant's confusion is apparently caused by the failure to distinguish between the *two* federal questions involved in that case.

II.

THE ALLEGED FEDERAL QUESTION IS WITHOUT SUBSTANCE.

A.

The controlling question in this case has already been decided by this Court.

The crux of defendant's complaint is that the trial court considered and charged on the ordinances without formally admitting them into evidence. The obvious answer to this complaint, as so clearly demonstrated by the Supreme Court of Ohio (R. 43-49), is that the defendant in open court waived proof of the ordinances and admitted that they were in force as pleaded. Such an admission of fact in open court and waiver of its proof may be the ground of the court's procedure equally as if established by the clearest proof; and this Court has so declared.

Oscanyan v. W. R. Arms Co., 103 U. S. 261, 263:

> "The power of the court to act in the disposition of a trial upon facts conceded by counsel, is as plain as its power to act upon the evidence produced * * *.
>
> "In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called * * *.

> Indeed, *any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof*; * * *.
>
> "But, as already stated, *it cannot make any difference as to the power of the court, whether the facts be developed by the evidence, or be admitted by counsel.*"

The court and plaintiff having relied on defendant's admission and waiver at trial, defendant cannot now retract his admission or seek a deceptive construction thereof.

B.

The claim that the defendant was misled by the court and prevented from offering testimony is utterly without merit.

Defendant claims tha ıe did not know the court held the ordinances to be relevant and that therefore he did not have the chance to offer testimony to show that they were not relevant.

To begin with, the court made it clear that he considered the ordinances relevant, as the testimony then stood, when he overruled defendant's motion for a directed verdict made at the end of plaintiff's case. Plaintiff's case, as defendant admits on page 2 of his petition for certiorari, was predicated on the ordinances. The question whether plaintiff had made out a case necessarily included the question whether the ordinances relied on were relevant and applied to the building involved. A ruling on the greater question necessarily and inevitably constituted a ruling on the included question.

> *Motor Finance Co., Inc. v. Universal Motors, Inc.*, 182 So. (La.) 143;
>
> *Clopton v. Clopton*, 162 Cal. 27, 121 P. 720, 722.

This ruling, it will be observed, was made before the time for defendant to put on his testimony.

In the second place, defendant was not entitled to a ruling *before* he put on his evidence. The court had stated he would rule on the question of relevancy *after all the evidence was in* (R. 23). Not only was this good and sound practice—since the court would then be in a better position to rule—but it met with no objection from the defendant at the time. In so postponing its ruling, the court in effect said to defendant: "If you have any question bearing on the relevancy of the ordinances, let us have it before I rule." Instead of *preventing* the defendant from offering testimony on the matter of the applicability of the ordinances, the court in fact *invited* him to offer any such testimony which he might have. When defendant now says he might have offered testimony after his objections were overruled, he is putting the cart before the horse. The time to offer evidence bearing on a question is *before* the question is ruled on, not *after*.

In the third place, there is nothing to indicate that defendant ever had any testimony to rebut the clear evidence of the plaintiff proving that the building was one which came within the scope of the ordinances. Certainly, defendant never offered or suggested such testimony at the trial or in the trial court. On the contrary, defendant himself and his own witnesses corroborated plaintiff's evidence as to the character of the building and established that the ordinances were indisputably applicable. Even as late as the hearing in the Supreme Court of Ohio defendant made no claim that the ordinance charged on by the trial court did not apply to a building of this character (R. 49). The fact that such claim is being made at this late date seems to indicate a rather desperate casting about for anything to try to support a claim of federal question.

CONCLUSION.

Respondent therefore respectfully submits that since the alleged federal question was not properly raised in the state courts, and since the question itself is without substance or merit, the petition for certiorari filed in this case should be dismissed.

Respectfully submitted,

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Encl